

***United States Court of Appeals
for the Second Circuit***



REPLY BRIEF

75-7441

United States Court of Appeals

For the Second Circuit

AMERICAN SMELTING AND REFINING COMPANY,
Plaintiff-Appellee,
against
S.S. IRISH SPRUCE, HER ENGINES, TACKLE, ETC.,
and against
IRISH SHIPPING LTD.
Defendants-Appellants.

In the Matter of the
Complaint of
IRISH SHIPPING LTD., Plaintiff-Appellant, as owner of the
S.S. "IRISH SPRUCE",
For exoneration from or limitation of liability.

COMPANIA PERUANA DE VAPORES, S.A.,
Claimant-Appellant,
AMERICAN SMELTING AND REFINING COMPANY,
Claimant-Appellee.

REPLY BRIEF OF IRISH SHIPPING LTD.

HEALY & BAILLIE
Attorneys for Appellant,
Irish Shipping Ltd.
29 Broadway
New York City

NICHOLAS J. HEALY
ALLAN A. BAILLIE
JOHN C. KOSTER
of Counsel

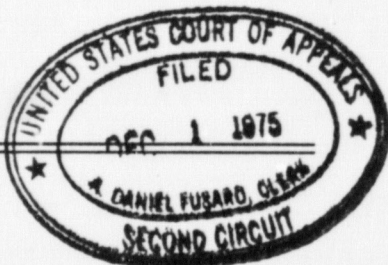




TABLE OF CONTENTS

	PAGE
Statement	1
ANSWERING POINT I OF CARGO'S BRIEF	2
A. The Charge of Unseaworthiness	2
1. Cargo's complaint that the Beacon was not included in various indices in the 1969 edi- tion	4
(a) The "Alphabetical List of Call Signs" (810a)	4
(b) The "Index of Geographical Sections" (803a)	7
(c) The "Alphabetical List of Morse Iden- tification Signals of Marine and Aero- Marine Radiobeacons" (819a)	8
(d) The "List of Radiobeacons-Service De- tails" (828a)	8
2. Cargo's complaint that "the 1969 List con- tained a specific warning that unlisted ra- diobeacons were not considered reliable for marine use, and further 'warned that the charted position of an Aero Radiobeacon not listed in this volume may be in error' "	9
3. Cargo's complaint that the power of the San Andres Beacon and the fact that it transmitted signals continuously were not shown in the 1969 edition	11
B. The Issue of Causation	17

	PAGE
C. The Issue of Due Diligence	21
ANSWERING POINT II OF CARGO'S BRIEF	22
CONCLUSION	24

Cases Cited

Korsnas Sagverks Akt. v. Unterweser Reeder Akt. (The Hedderheim), 39 F. Supp. 558 (S.D.N.Y. 1941)	3
In Re Marine Sulphur Queen, 460 F.2d 89 (2d Cir. 1972), <i>cert. denied</i> 409 U.S. 982 (1972)	20
The Maru, 459 F.2d 1370, 1373 (2d Cir. 1972), <i>cert.</i> <i>denied</i> 409 U.S. 1115 (1973)	4, 19, 20
Middleton & Co. v. Ocean Dominion S.S. Corp. (The Iristo), 43 F. Supp. 29 (S.D.N.Y. 1941), <i>aff'd</i> , 137 F.2d 619 (2d Cir. 1943), <i>cert. denied</i> 320 U.S. 802 (1943)	3
The Nicolaos S. Embiricos, 1974 A.M.C. 2608, 2613 (S.D.N.Y. 1973), <i>aff'd on opinion below</i> , 506 F.2d 1395 (2d Cir. 1974)	20
United States Steel Prod. Co. v. American & For- eign Ins. Co. (The Steel Scientist), 82 F.2d 752, 754 (2d Cir. 1936)	3
Waterman v. The Aakre, 122 F.2d 469 (2d Cir. 1941), <i>cert. denied</i> 314 U.S. 696 (1941)	3

United States Court of Appeals

For the Second Circuit

75-7441

AMERICAN SMELTING AND REFINING COMPANY,
Plaintiff-Appellee,
against

S.S. IRISH SPRUCE, HER ENGINES, TACKLE, ETC.,
and against

IRISH SHIPPING LTD.
Defendants-Appellants.

In the Matter of the
Complaint of
IRISH SHIPPING LTD., Plaintiff-Appellant, as owner of the
S.S. "IRISH SPRUCE",
For exoneration from or limitation of liability.

COMPANIA PERUANA DE VAPORES, S.A.,
Claimant-Appellant;

AMERICAN SMELTING AND REFINING COMPANY,
Claimant-Appellee.

REPLY BRIEF OF IRISH SHIPPING LTD.

Statement

Now conceding that the British Decca Navigator "is a nice piece of equipment," although it cannot be used

in the Caribbean (Cargo's Brief,¹ p. 36), Cargo does not quarrel with the Special Master's ultimate conclusion that the IRISH SPRUCE was not unseaworthy because she was equipped with Decca rather than the American Loran type of electronic position finder.

While *not* conceding seaworthiness with respect to the "Pilot", that issue has been relegated to a footnote at Brief, p. 22, and Cargo is not asking this Court to set aside the Special Master's conclusion that the alleged "unseaworthiness" in this respect "does not appear to have been a material cause of the stranding". (Report, 992a). The issues on this appeal have therefore been narrowed to those surrounding the List of Radio Signals on board the IRISH SPRUCE on her final voyage.²

ANSWERING POINT I OF CARGO'S BRIEF

In Point I of its Brief, Cargo contends (a) that the Vessel was unseaworthy because she had on board the 1969 instead of the 1971 edition of the British Admiralty List of Radio Signals ("List"); (b) that the alleged unseaworthiness was a cause of the loss, and (c) that Owners did not prove due diligence to make the Vessel seaworthy with respect to the List. These contentions will be examined in the order presented in Cargo's Brief.

A. The Charge of Unseaworthiness

Quoting the District Court's Memorandum Decision (1018a-1019a), Cargo contends (Brief, pp. 7-8) that the

¹ Hereinafter referred to as "Brief".

² The issue whether the Special Master improperly relied on opinions formed as Commanding Officer of Loran stations (Point III of Owners' Brief and Point II of Cargo's Brief) relates to the List of Radio Signals, because Owners contend, and Cargo denies, that these opinions led the Special Master to hold Owners to "an unnecessary counsel of perfection" with respect to the List.

absence of the 1971 edition of the List "deprived the ship of the information which was available and which it needed to be reasonably equipped to carry out its services".

This conclusion is manifestly wrong. Cargo does not—and indeed cannot—find any relevant error whatever in the 1969 edition that *was* on board, but nevertheless contends (Brief, pp. 7-9), that the Special Master properly found that "The 1969 List did not reveal that there was an aerial [sic] radio beacon on Isla San Andres (St. Andrews Island) that would be a valuable marine aid". (Report, 992a).

In charging the vessel with unseaworthiness in respect of the edition of the List of Radio Signals on board, Cargo argues for a "counsel of perfection" that the law does not require. "A ship must indeed be reasonably fitted for her service, but ordinarily she need not conform to a higher standard of care than that which prevails among duly accredited masters of experience". L. Hand, Ct. J., in *United States Steel Prod. Co. v. American & Foreign Ins. Co. (The Steel Scientist)*, 82 F.2d 752, 754 (2d Cir. 1936). See also *Waterman v. The Aakre*, 122 F.2d 469 (2d Cir. 1941), *cert. denied* 314 U.S. 690 (1941); *Middleton & Co. v. Ocean Dominion S.S. Corp. (The Iristo)*, 43 F. Supp. 29 (S.D.N.Y. 1941), *aff'd*, 137 F.2d 619 (2d Cir. 1943), *cert. denied* 320 U.S. 802 (1943); *Korsnas Sagverks Akt. v. Unterweser Reederei Akt. (The Hedderheim)*, 39 F. Supp. 558 (S.D.N.Y. 1941).

The bases alleged in support of Cargo's contention that the 1969 edition did not reveal the existence of a "valuable" aero radiobeacon on San Andres (Brief, p. 8) are as follows:

1. That the 1969 edition did not include the Beacon:
 - (a) in an alphabetical list of call signals (also referred to as "call signs" or "identification signals") beginning on p. 17 (810a);

- (b) in a "geographical index" beginning on p. 10 (803a);
- (c) in an alphabetical list of "Morse identification signals" beginning on p. 77 (819a);
- (d) in a list of radiobeacons beginning on p. 86 (828a³).

2. That the 1969 edition "contained a specific *warning* that unlisted aero radiobeacons were not considered reliable for marine use, and further warned that the charted position of an Aero Radiobeacon not listed in this volume may be in error".

3. That the 1969 edition did not indicate the Beacon's power or that it operated continuously.

Since these are the only allegations asserted in support of the Special Master's conclusion that while it might seem a "small defect" (Report, 1003a) the absence of the 1971 edition was, together with navigational error, a material cause of the loss, Owners will answer each in some detail. It should, however, be stressed that the alleged inadequacy of the 1969 edition—and Owners emphatically deny its inadequacy—could not possibly have had anything whatever to do with the loss, because *the List was never consulted at any material time prior to the stranding*—precisely the situation existing in *The Maru*, 459 F.2d 1370, 1373 (2d Cir. 1972), *cert. denied* 409 U.S. 1115 (1973).

1. Cargo's complaint that the Beacon was not included in various indices in the 1969 edition.

(a) *The "Alphabetical List of Call Signs" (810a).*

San Andres is of course not listed in the "Alphabetical List of Call Signs" because, as stated at the very beginning

³ There is a typographical error on p. 8 of Cargo's Brief, where the reference is to "820a".

of that list (810a) it comprises the call signs of (1) radio direction finding stations and their associated call stations, (2) radio stations providing "QTG" services, and (3) marine radiobeacon, calibration, radar and radar beacon stations; it does *not* list the call signs of *any* aero radiobeacon. But the fact that neither San Andres nor any other aero radiobeacon was included in the "Alphabetical List of Call Signs" is wholly immaterial. The area chart of Central America and the West Indies following the Diagrammatical Index in the 1969 edition (reproduced opposite page 8 of Owners' Main Brief) plainly shows (1) the location⁴ of the San Andres Beacon, (2) its call sign ("SPP"), (3) its frequency ("387"), and (4) (from its color) that it is an aero, and not a marine radiobeacon.

It would obviously be an exercise in futility, for a navigator to consult an alphabetical list of call signs unless he first heard a call sign on the radio direction finder (RDF) and wanted to know the name of the beacon whose call sign he heard. Here, since the navigators were not, and had no intention of using the RDF, they of course heard *no* call sign and therefore had no occasion to consult *any* list of call signs.

As explained in Owners' Main Brief (pp. 7-8), if the navigators *had* wanted to use the RDF, they would of course first have had to find out what radiobeacons, if any, were available in the area. In the 1969 edition on board they could have found San Andres, with its call sign and frequency plainly shown in legible type, on the area chart in the volume itself. There would therefore have been no reason whatever to look under "SPP" in any alpha-

⁴ The area chart in the 1969 list shows that the Beacon is on San Andres. The exact latitude and longitude of that very small island could of course be ascertained from the navigational charts (Exhs. 3 and 6).

betical list of call signs, even if the volume had included a list of call signs of *aero* radiobeacons, because they would have already learned from the area chart that "SPP" was the call sign of the San Andres Beacon. If one already knows that the call letters of the New York Times Radio Station are "WQXR", there is obviously nothing to be gained by looking in an alphabetical list of radio station call letters for the name of the station whose call letters are 'WQXR'.

The 1971 edition combines the information that in the 1969 edition was contained in the "Alphabetical List of Call Signs" (810a) and the "Alphabetical List of Morse Identification Signals of Marine and Aero-Marine Radiobeacons" (819a) into a single "Alphabetical List of Morse Identification Signals of Radiobeacons and 'QTG' Stations", which includes *aero*, as well as *marine* and *aero-marine* radiobeacons. But if the 1971 edition had been on board, Second Officer Healy would have had no occasion to consult the "Alphabetical List of Morse Identification Signals." Since he was unaware of the existence of San Andres, in order to ascertain what beacons, if any, there were in the area, he would first have had to consult either (a) the area chart in the separate folder supplementing Volume 2 of the 1971 edition, or (b) the section headed "Service Details" (950a). If he first looked in that section, it "would * * * have been possible to have missed it [San Andres]," as the Special Master found, because, in the Special Master's words, in the 1971 edition "It [San Andres] geographically appears under Columbia, although it is closer to the coast of Nicaragua, and in the general index it appears only under the name of 'Isla San Andres' not under 'San Andres Island' ". (Supplemental Report, 1029a).

If, on the other hand, the Second Officer looked at the *area chart* in the 1971 edition, he would find the name and number (5439) of the San Andres Beacon (although not its call sign or frequency). Only then could he find the Beacon's call sign and frequency without difficulty, because, in the section headed "Service Details" in the 1971 edition, the beacons are listed in numerical order, as well as geographically (950a).

(b) *The "Index of Geographical Sections" (803a).*

It is perfectly true that San Andres was not listed by name in the "Index of Geographical Sections"⁵ in the 1969 edition for the reason that that index is not a list of *radio-beacons*, but an alphabetical list of *geographical areas*, e.g., "Colombia (Caribbean Coast)", opposite each of which is a reference to the page of the List on which the "service details" of certain radiobeacons in the particular geographical area are given.

A navigator unaware of the existence of San Andres would scarcely know under what geographical section to look for a beacon in the area. If he *did* look in the "Index of Geographical Sections" he would not be likely to look under "Colombia (Caribbean Coast)", because San Andres is not situated off the Caribbean Coast of Colombia. If he were to look under "Nicaragua", he would be unable to find San Andres, in either the 1969 or the 1971 edition. The logical place to begin, therefore, would be the area chart in Volume 2 of the 1969 edition, or, if he had access to the 1971 edition, the area chart in the folder supplementing Volume 2 of that edition. If he was using the 1969 edition, he would have to go no further, because he would know from the area chart itself the location, call sign

⁵ Referred to in Cargo's Brief, p. 8, as the "geographical index".

and frequency of San Andres—all he would have to know in order to try to get a bearing.

Here again, it must be remembered that since no one on the IRISH SPRUCE had any intention of using the RDF, they had no reason to examine the geographical or any other index.

(c) *The "Alphabetical List of Morse Identification Signals of Marine and Aero-Marine Radiobeacons" (819a).*

This complaint can be readily answered. San Andres was of course not included in this list because it is neither a *marine* nor an *aero-marine* radiobeacon. No *aero* radiobeacons are included in the list, which comprises only *marine* radiobeacons (which, as the name indicates, are specifically designed for *marine* navigation) and *aero-marine* radiobeacons, designed for both *marine* and *air* navigation. See p. 65 of the 1969 List (816a), where it is stated that "In coastal regions, some administrations have established radiobeacons specifically for both marine and air navigation; these beacons are classified as 'aero-marine'." San Andres is not one of these; it is an *aero* radiobeacon designed for air navigation, although it may sometimes be used for marine navigation.

(d) *The List of "Radiobeacons—Service Details" (828a).*

It is true that San Andres was not included in the section of the 1969 edition giving the "service details" of certain radiobeacons. This section, like the corresponding section of the 1971 edition, is arranged geographically,⁶

⁶ In the 1971 edition the arrangement is also numerical. (950a). This is so presumably because the area charts in the 1971 edition (unlike those in the 1969 edition) do not indicate the call signs or frequencies of the radiobeacons, but instead give their numbers. In the 1971 edition the call sign and frequency of a radiobeacon found on the area chart can be ascertained by looking under its number in the "Service Details" section.

and if San Andres had been included, it would presumably have been listed under "Colombia (Carribean Coast)", as it was in the 1971 edition, and might therefore have been missed, as the Special Master conceded. (Supplemental Report, 1029a).

2. Cargo's complaint that "the 1969 List contained a specific warning that unlisted aero radiobeacons were not considered reliable for marine use, and further 'warned that the charted position of an Aero Radiobeacon not listed in this volume may be in error'".

Each of these alleged "warnings" will be separately considered. The statement at Brief, p. 8, that "the 1969 List contained a specific *warning* that unlisted aero radio-beacons were not considered reliable for marine use" is apparently based on a statement to that effect in the Special Master's Report (993a), quoted at Brief, p. 18. The statement is inaccurate. The warning referred to is part of the fourth of four paragraphs in boldface type under the heading "WARNING" in the 1969 edition (815a)⁷ and under the heading "CAUTION" in the 1971 edition (945a-946a). The warning referred to by the Special Master and Cargo reads:

"4. A number of Aero Radiobeacons considered to be particularly unsuitable for marine use *have been omitted from this edition*⁸ and others may be removed by Section VI of the Weekly Edition of Notices to Mariners. Associated chart action will be effected as opportunity occurs. Meanwhile, mariners are warned that the charted position of an

⁷ The warning was added as a "correction" to the 1969 edition by a Notice to Mariners." (796a). In inserting it in the volume (Exh. 10), the officer pasted Paragraph "4" ahead of Paragraph "1." (815a).

⁸ Emphasis throughout has been added, except where otherwise indicated.

Aero Radiobeacon not listed in this volume may be in error."

It will be noted that the warning is *not* that "*unlisted*" aero radiobeacons are not considered reliable for marine use; it is that aero radiobeacons considered particularly unsuitable for such use "*have been omitted from this edition * * **" San Andres was *not* omitted from the 1969 edition; its name, location, call sign and frequency were plainly indicated on the area chart in that edition reproduced opposite p. 8 of Owners' Main Brief.

The other charge under this heading is that the 1969 edition "warned that the charted position of an Aero Radiobeacon not listed in this volume may be in error". Neither in the Special Master's initial Report nor in his Supplemental Report is any point made of the fact that the 1969 edition contained this warning (815a), presumably because *the same warning, in identical language, is contained in the 1971 edition (946a).*

In any case, there is no substance to Cargo's complaint. As stated above (pp. 4-5, 8) *no* aero radiobeacons are included in the "Alphabetical List of Call Signs" (810a) or in the "Alphabetical List of Morse Identification Signals of Marine and Aero-Marine Radiobeacons" (819a), and *no* radiobeacons of *any* type are listed by name in the "Index of Geographical Sections". The *only* place in the 1969 edition, other than the area charts, where the names of *any* aero radiobeacons appear is in the section entitled "Radio Beacons—Service Details" (828a), wherein the "service details" of certain aero radiobeacons (not including San Andres) are contained.

It would appear that the warning that "the charted position of an Aero Radiobeacon not listed in this volume may be in error" applies *only* to aero radiobeacons whose

positions appear on navigational charts, but which are not "listed" either in the area charts or under "Radiobeacons—Service Details". But even if Owners' interpretation of the warning were incorrect, it would make no difference in the case of the San Andres Beacon, which was *not* charted, *i.e.*, indicated on the Navigational Charts (Exhs. 3 and 6) (which are not to be confused with the area charts included in the List of Radiobeacons). Its position could, however, be readily ascertained from the Navigational Charts, because it is not located on the mainland, or on a large island such as Cuba or Santo Domingo, but on a tiny island which of course *is* charted.

The 1971 edition warns, as does the 1969 edition, that "*The inclusion of an Aero Radiobeacon in this volume does NOT⁹ imply that it has been found reliable for marine use*" (943a). In light of this warning, how can it possibly be said that the 1971 edition would have revealed that San Andres "would be a valuable marine aid"? (Report, 992a; Brief, pp. 9-10).

3. Cargo's complaint that the power of the San Andres Beacon and the fact that it transmitted signals continuously were not shown in the 1969 edition.

In the section of the 1971 edition headed "Service Details" (950a-951a) there is an entry for 'Isla San Andres'—not "*San Andres*" or "*San Andres Island*" or "*St. Andrews Island*"—under the geographical heading "(Caribbean Coast) COLOMBIA"—not "NICARAGUA"—indicating, in addition to its position, call sign and frequency, that it was a "1.0 kW Cont" beacon, *i.e.*, that its power was said to be one kilowatt, and that it was supposed to transmit signals continuously (except when shut down for maintenance), and not only during certain hours of the day or night. This is the only place in the 1971 edition where this information appears.

⁹ Capitalization in the original.

Although in his Supplemental Report the Special Master conceded that "the San Andres beacon is not as clearly listed in the 1971 Admiralty List of Radio Signals as it might have been", and that "It would, therefore, have been possible to have missed it in examining the new list" (1029a), in his initial Report he nevertheless categorized the absence of the information to be gleaned from "1.0 kW Cont" from the 1969 edition as the "most important" basis (993a) for his charge that the equipment of the Vessel with the 1969 edition instead of the 1971 edition, although it appeared to be "a small defect" (1003a), constituted an "unseaworthy condition".¹⁰

The Report (and Cargo's Brief, pp. 8-15) might lead one to believe that a 1 kW aero radiobeacon is extraordinarily powerful. It is nothing of the sort. The 1971 edition contains a table under the heading "POWER" (947a), which "gives a tentative guide to the range, in nautical miles at which an *average* beacon of given power may be *expected* to be useable for D/F purposes *under good conditions*". The table lists the *expectable* range, *under good conditions*, of beacons with output power ranging all the way from 0.025 kW to 10.0 kW—ten times that of San Andres! According to the table, a beacon with a power of 10 kW would have an *expectable* range of 500 miles *under good conditions*; one with a power of 0.025 kW would have an *expectable* range of 45 miles under like conditions. The median range between 45 and 500 miles is 272.5 miles,

¹⁰ Immediately after stating that what was "most important" was that in the 1971 edition San Andres was listed as a 1 kW beacon transmitting continuously, the initial Report states that "Moreover, the new volume indicates that a beacon of one kilowatt may be expected to be usable, under good conditions, up to a range of 240 nautical miles." The 1969 edition contains the same information (814a), and adds that "Owing to variations in propagation conditions, etc., there is no fixed relationship between transmitter power and range" (814a), a caveat not found in the 1971 edition.

greater than the expectable range of a 1 kW beacon such as San Andres under good conditions.

Cargo is plainly in error in contending that the 1969 edition did not indicate that San Andres was supposed to operate continuously, and not merely during certain hours of the day or night. Under the heading "AERO RADIOBEACONS" (816a), the 1969 edition specifically states that "Since *most* *aero radiobeacons* *transmit continuously*, it is possible to take bearings on them at any time during their hours of service, in fog or clear weather." And at 817a it states:

Apart from short breaks for maintenance purposes, *aero radiobeacons listed in this volume operate continuously throughout the 24 hours unless otherwise stated*.¹¹ No attempt has been made to indicate the *exact* hours of service of beacons which do *not* operate continuously. Beacons which are stated to operate "by day" may shut down at week-ends when the aerodromes at which they are situated are closed, and their switch-on and switch-off times may vary; they may be heard to operate outside their normal hours, for the use of aircraft on particular flights. Beacons whose service is stated to be "occasional" generally operate *only* as required by aircraft on particular flights; their usefulness to shipping is obviously limited, but they are included in the list in areas where few continuously-operating beacons exist.

Cargo may argue that "listed" means "listed alphabetically or geographically". But it is apparent that "listed", as used here, was plainly intended to refer to aero radiobeacons whose location, call sign and frequency

¹¹ The italics appear in the original.

are plainly "listed" in the area charts following the diagrammatical index contained in the 1969 edition. In any case, it is beyond belief that if a concededly conscientious navigator such as Second Officer Healy *wanted* to use a particular aero radiobeacon, he would be deterred from attempting to tune in on it simply because he was not sure whether, like *most* aero radiobeacons, it was supposed to operate at all hours, or whether it was one of the few that was supposed to operate only during certain times of the day or night.

Cargo's paraphrasing of the testimony of its experts (Messrs. McNally, McGinty, Gregware and Lowell) is in a number of instances inaccurate and incomplete. In any event, that testimony is completely irrelevant. The issue is *not* the "seaworthiness" of the San Andres Beacon; it is the seaworthiness of the IRISH SPRUCE in respect of the List of Radio Signals on board. What others did, or might have done, under conditions differing from those prevailing on the IRISH SPRUCE on the fatal night can have no bearing here, where only the Master knew there was a beacon on San Andres, where neither he nor any of the watch officers ever used or had any intention of using the RDF at any of the material times, and where no one ever looked at the 1969 edition on board. The omission to use the RDF under the circumstances existing on the night of the stranding was *not* an error. But even if it *was* an error, it was clearly an error in navigation, for which Owners are entitled to the protection of COGSA.

At p. 9 of its Brief, Cargo states that all three watch officers testified that "had they known about the aero radiobeacon *and its capabilities* they would have used it". This statement is presumably intended to mean that if the officers had known that San Andres was a one kilowatt station which was supposed to transmit continuously they would

have used it. This is *not* what they said. Nor did the Second Officer testify, as the Report states he did (994a; Brief, p. 14), that he would have used the San Andres beacon had he been aware of it. At the hearing Mr. Healy testified on cross-examination that he did not honestly know whether he would have used it or not (77a); *if he "thought it was good" he "assumed" he would have used it.* (79a).

And on his deposition Mr. Healy testified (542a-543a):

Q. Is it true that under the circumstances that were present on the IRISH SPRUCE, namely, that conditions were not appropriate for evening star positions, there is no Decca Station in the area so that you can use the Decca Navigator and that the navigation lights are weaker, is it true it would be useful to use RDF if possible? A. If there were one within range and also the position of it would have a lot to do with it. For instance, *if you were heading for a point of land or entrance to a port and there is a radio beacon at the entrance or near the entrance to that port, that radio beacon will be useful for the purpose of steering a course for that port.*¹² However, it will not be useful and give no indication of how far from that port you are.

In testifying on deposition that the existence of the Beacon could only have been found from the indices (515a) Captain Kelly, Chief Officer of the IRISH SPRUCE, was plainly in error, as San Andres (with its location, call signal and frequency) could readily be found on the pertinent area chart in the 1969 edition (Owners' Main Brief, opposite p. 8). The Table of Contents on p. 5 of the

¹² The instructions in the 1969 edition support Mr. Healy's opinion that an *areo* radiobeacon is useful in marine navigation mainly as a homing device. Exh. 10, p. 65 (816a).

1969 edition (Exh. 10; 798a) lists all of the area charts (radiobeacon diagrams) contained in the volume by area and number, including "Central America and the West Indies" (No. 5994). In any event, Captain Kelly corrected himself at the hearing, stating that since his deposition he had learned that San Andres *is* shown on the area chart.

At Brief, p. 13, Cargo states that Owners "argued that the Master had some knowledge of the existence of the beacon at San Andres and would not have been inclined to use the new list even if it had been on board". This is an understatement of Owners' position. Owners stated flatly that the Master *did* know of the Beacon's existence, but nevertheless would *not* have used the 1971 edition had it been on board—a statement which is completely correct, as an examination of the transcript of his testimony will show. (463a; 483a; 495a).

The Report states (994a) that "Had Captain Kerr had accurate knowledge of the beacon's capability, it is *quite possible* he would have used it. In any event, his generalized indication that he would not have used the beacon (*testimony intended to relieve his employers from liability*) is not binding nor even particularly persuasive". There is no basis for the Special Master's gratuitous remark. He never saw or heard Captain Kerr, who testified by deposition, and nowhere in the record is there any indication that his testimony was "intended to relieve his employers from liability", or that it was anything but completely truthful. In any case, Captain Kerr's information that San Andres "is quite weak" (495a) is not incorrect. As shown above, a one kilowatt beacon is weaker than average.

Third Officer O'Connor testified (556a):

Q. Do you know what the power of the radio beacon was on San Andres? A. No.

Q. If you had known that there was an aero radio beacon on San Andres and if it had a range of more than 150 miles, would you have used it? A. I might have but I would not be very confident in the results I would get due to night effect.

At Brief, p. 15, Cargo confuses the question whether San Andres was a beacon with a "continuous operation" schedule with the question whether the beacon was actually in operation on the night of the stranding. San Andres, like most aero radiobeacons, was scheduled to transmit 24 hours a day, except during maintenance periods. But this is not a proper substitute for proof that the Beacon was *actually* operating on the night of the casualty. The only evidence is that it was operating on certain occasions remote in time from that night. The Special Master was clearly in error in stating that the evidence showed the Beacon had been in continuous transmission before and after the stranding. (995a). There was no such evidence.

B. The Issue of Causation

Owners submit they have proved that the IRISH SPRUCE was seaworthy in every material respect. But even if it be assumed, *arguendo*, that having the 1969 rather than the 1971 edition of the Radio Signals List on board constituted "unseaworthiness", the decision below should nevertheless be reversed, because Cargo has completely failed to meet its burden of proving causation.

Since neither the Master nor any of the watch officers ever had any intention of using San Andres, and therefore none of them ever reached for the 1969 edition, how can it possibly be said that the Second Officer would have taken the 1971 edition off the shelf had it been on board? There is nothing in the record to support Cargo's con-

tention that the Special Master was correct in concluding that *if* Mr. Healy *had* reached for the 1971 edition and *had* been able to find San Andres in it, and *had* been able to get a recognizable signal from it, he would have used it to make a "running fix" or to obtain a "danger angle." When Mr. Healy *did* use the RDF, it was to "home in" on a point of land or a port toward which he was heading. See his testimony quoted at p. 15, *supra*.

On the night of the stranding, while the Vessel was being navigated by "dead reckoning", so that her exact position may not have been known (460a), the officers nevertheless did not consider themselves "lost"; if they had, they would surely not have continued ahead at full speed. There was therefore no sense of urgency to lead her navigators to look in every nautical publication on board in the hope of finding information which might help in ascertaining their position.

At Brief, p. 23, Cargo charges Owners with misstating the evidence in alleging (Owners' Brief, p. 37) that when squalls interfere, a bearing "can be in error by 10°". Owners did *not* misstate the evidence. Cargo's expert, Lowell, explained that the "null" of a signal represents the number of degrees between the point when the signal fades and the point when it is again picked up. Cargo is incorrect in saying that the mean of a 10° null gives the actual bearing. The actual bearing could be anywhere between the first bearing and the second, and could therefore be in error by as much as 10°, particularly if the first or second bearing, or both, were inaccurate.

Cargo (Brief, p. 29) attempts to distinguish *The Maru*, 459 F.2d 1370 (2d Cir. 1972), where this Court held that although an outdated and erroneous chart made the vessel unseaworthy, the unseaworthiness was not a cause of the

casualty, since the Master was navigating by visual observation and did not check *any* chart in setting his course. Cargo contends that in the instant case the "evidence established that they [the officers of the *IRISH SPRUCE*] would have used the up-to-date List of Radio Signals", and that "This is exactly opposite to the situation presented in the *Maru* case".

Cargo is able to cite nothing in the Record to support its contention. Mr. Healy testified (77a) that if Isla San Andres had been listed in the "geographic index" or the "alphabetical index of signals" he did not think he would have attempted to use it because he had in mind trying Swan Island, and that when he turned on the RDF the static was so bad he "didn't even try that". He continued:

Q. Going back to the radio beacon at Isla San Andres, you say you didn't know there was a radio beacon there. But if you had known there was a radio beacon there and if you had known it had power of a thousand watts, and that it had continuous transmission, don't you think it is possible you would have used it then? A. It is possible, but I don't honestly know.

How can such testimony possibly be considered as the proof of causation required of Cargo under this Court's decision in *The Maru*? Contrary to Cargo's contentions, that decision is squarely in point. There, the defective chart was held not to be a cause of the casualty because the Master did not consult *any* chart in setting his course. In the case of the *IRISH SPRUCE*, even if the 1969 edition of the List had been defective—and it was not—the officers were navigating by dead reckoning, and not by RDF, and therefore did not consult *any* list of radio signals. It can no more logically be inferred that if the 1971 edition had

been on board it would have been used, although the 1969 edition was not, than it could have been inferred in *The Maru* that had the new chart been on board it would have been used, even though the old one was not.

In the footnote on p. 28 of its Brief, Cargo asserts that the citation of *In Re Marine Sulphur Queen*, 460 F.2d 89 (2d Cir. 1972), *cert. denied* 409 U.S. 982 (1972), at Owners' Brief, pp. 27-28 and 31-32, is "inappropriate". Owners disagree. It is perfectly true that under COGSA the carrier has the initial burden of proving that a loss was caused by an excepted peril, whereas under certain charter party forms the charterer has the initial burden of establishing how the loss occurred. But under COGSA, once the carrier meets its initial burden—as it did here by establishing that the loss was caused by navigational error—the rule of *The Maru*, *supra*, then imposes on cargo the burden of proving (1) unseaworthiness (or other non-excepted peril), and (2) that the unseaworthiness (or other non-excepted peril) was a cause of the loss. The point for which *In Re Marine Sulphur Queen* is cited is that *whenever* the burden of proving a causal connection between unseaworthiness and a loss rests with cargo, cargo does not enjoy the benefit of an inference of causation.

Again, contrary to Cargo's contentions (Brief, p. 29), *The Nicolaos S. Embiricos*, 1974 A.M.C. 2608, 2613 (S.D.N.Y. 1973), *aff'd on opinion below*, 406 F.2d 1395 (2d Cir. 1974), is also squarely in point. There, it was found that the radar would not have been used even if the up-to-date "Pilot", suggesting that certain islands could be detected by radar, had been on board. In the case of the *IRISH SPRUCE*, the evidence is clear that the RDF would not have been used even if the 1971 "Pilot" had been on board.

C. The Issue of Due Diligence

Cargo's arguments (Brief, pp. 31-33) that Owners failed to sustain their burden of proving "due diligence" have been answered in Owners' Main Brief (pp. 24-25), but two points require further comment.

In a footnote at Brief, p. 32, Cargo alleges that Owners were wrong in stating, at p. 25 of their Main Brief, that the 1971 edition was sent to the Vessel by air mail, when it was requisitioned, along with other nautical publications, by Second Officer Healy. The requisition was sent from Callao, Peru, on January 3, 1972 (61a, 141a). A copy of the requisition was sent by Owners' Dublin Office to Messrs. Cooke & Son, the Admiralty chart agents at Hull, England on January 12th (141a), and Messrs. Cooke sent the publications to New Orleans, where they were to arrive "about the 23rd of January." Owners did not ask that they be sent to South America because they had had bad experience with sending mail to South American ports. (142a)

These dates indicate very clearly that air mail (or air freight) must have been employed by the Second Officer in sending the requisition to Dublin, by Owners in placing the order with the Admiralty agents, and by the latter in sending the requisitioned publications to New Orleans. Otherwise, they would not have arrived there until long after January 23rd.

Captain Raftery testified (142a) that the practices followed by Owners were basically the same as those of other companies with whom he had "checked." He did *not* say, as Cargo states at Brief p. 33, that other companies "*would*" send materials such as the List of Radio Signals

without waiting to be asked. He testified on cross examination (146a):

Q. You mentioned other companies. Don't you know of any companies that send the document [sic] like the pilot to the ship from the head office?

A. Do I know of?

Q. Haven't you ever heard of a shipping company sending out something out like the list of radio signals or pilot or chart directly to a ship without waiting to be asked for it? A. I'd say there *could be* companies that would do it.

ANSWERING POINT II OF CARGO'S BRIEF

Point II of Cargo's Brief is concerned with the issue whether the Special Master improperly relied on opinions formed as Commanding Officer of Coast Guard Loran Stations.

Cargo's Brief (p. 33) states that Owners complain that they have been treated "unfairly" by the Magistrate and the District Judge. Nothing in either the record or in Owners' Brief supports Cargo's statement. Owners vigorously contend that the findings and conclusions were clearly erroneous, but such a charge cannot be equated with "unfairness."

Cargo further alleges that Owners are wrong in "alluding to a reference 'ordered by the District Court over the parties' objections' ", citing Owners' Brief, p. 39. Nowhere in their Brief did Owners contend they did not consent to the reference. The sentences from which Cargo has extracted the quoted words read:

Indeed, had such a reference been ordered by the District Court over the parties' objections, the order

would have been subject to constitutional objections. [Citing cases]. The question, therefore, is whether the otherwise objectionable reference herein was validated by their consent (Owners' Main Brief, p. 39).

Cargo further contends that Owners "complained only after the case had been decided against it". The first time Owners learned that the Special Master had relied on his experience as a Loran Station Commander was when they received his initial Report. They promptly filed objections to it, including an objection (1015a) that it "improperly relies on the Special Master's personal experience as Commanding Officer, for short periods, of two Loran stations, a circumstance not disclosed to Counsel before or at the commencement of the hearings". How could Owners possibly have objected to the Special Master's reliance on opinions formed during his Coast Guard service until they read his Report and saw that it relied on those opinions?¹³

¹³ In a footnote at Brief, p. 3, Cargo states that "The carrier-appellant included in the Appendix the *draft* of the Report instead of the *final* Report", and charges Owners with misquoting "the Report" in their Brief. Owners included in the Joint Appendix a copy of the Report as received from the Special Master (975a), together with a copy of a "Rider", also received from the Special Master (1010a), listing changes suggested by counsel for Cargo and counsel for Owners and accepted by the Special Master. It now appears from an examination of the Court records and the correspondence that the Special Master physically made the changes in the Report itself before submitting it to the District Judge, although a copy of the Report, as so corrected, was not sent to Owners' counsel.

The facts remain that in his initial Report the Special Master did refer to the nautical publication which he held constituted "unseaworthiness" as the "light list", rather than as the "Admiralty List of Radio Signals", its proper designation; that this error was corrected when it was called to his attention by Cargo's counsel, and that it was repeated twice in the Special Master's Supplemental Report (in the thirteenth line of the second page and the fifth line of the fifth page) (1025a, 1028a), as stated in Footnote 7 on p. 21 of Owners' Main Brief. The Supplemental Report was apparently never corrected.

At Brief, p. 34, Cargo states that "Oddly enough the carrier complains about the Magistrate's understanding of navigation in a navigation case" (citing Owners' Brief, pp. 39-40). Owners made no such complaint. The Special Master could of course have taken judicial notice of rudimentary navigational information of which any Judge could take judicial notice. But this is far from saying that he could properly draw upon personal opinions concerning so highly technical a subject as the relative merits of Loran and Decca, formed while Commanding Officer of Coast Guard Loran stations, rather than upon the testimony of experts which could be evaluated by the District Judge in the cold light of the cross-examination to which they—unlike the Special Master—would have been exposed.

Owners do not and never have contended that the Special Master found the IRISH SPRUCE unseaworthy because she was not equipped with Loran. But it is clear from the Report that because she was not equipped with Loran the Special Master held the IRISH SPRUCE to a higher "counsel of perfection" than he would have held her to had she been so equipped. In so doing he was plainly in error.

CONCLUSION

For the reasons stated in this and Owners' Main Brief, the decision below should be reversed, with costs; alternatively, the case should be remanded for trial before a district judge.

Respectfully submitted,

HEALY & BAILLIE
Attorneys for Appellant,
Irish Shipping Ltd.

NICHOLAS J. HEALY
ALLAN A. BAILLIE
JOHN C. KOSTER
Of Counsel

Service of three ² copies of the within
is admitted this day of 19

1975 DEC -1 PM 3:19

COPY RECEIVED
DEC 1 - 1975 *2 copies*
Bigham, Enger, Jones & Reaston

D. Evans

Stanley Levine

ack